Before the
Federal Communications Commission
Washington, D.C.

In the Matter of:	)	
	)	
Implementation of Section 304 Of the Telecommunications Act of 1996	))	CS Docket No. 97-80
	)	
Competitive Availability of Navigation Devices	)	
	)	
Compatibility Between Cable Systems and Consumer Electronics Equipment	))	PP Docket No. 00-67

To: The Secretary of the Commission
Attention: The Commission

COMMENTS OF ZITO MEDIA, LP

Zito Media, LP ("Zito"), by its attorneys, pursuant to §1.415 of the Commission's rules, hereby respectfully submits its comments in response to the *Fourth Further Notice of Proposed Rulemaking*, FCC 10-61, released April 21, 2010 ("*FFNPRM*") in the captioned proceeding. As detailed herein, Zito strongly supports the proposal at ¶ 22 of the *FFNPRM* that operators be allowed to place into service new, one-way navigation devices (including devices capable of processing a high-definition ("HD") signal) that perform both conditional access and other functions in a single integrated device but do not perform recording functions.

Introduction – Zito operates several dozen very small cable systems that face acute competitive pressure. The smallest (serving Wallins, Kentucky) has a mere 80 subscribers and a penetration rate of only 5%. Most of its very small systems are served by their own head-end. Nearly all have suffered a loss of subscribers during the preceding year, ranging from single digits to 60%.

None of the subject systems is dominant in its market. The only competition most of its customers have available for broadband access is from satellite dishes (Dish Network and DirecTV). In order for Zito to remain viable – and to provide the only meaningful competition and broadband access in its markets – Zito must be able to offer comparable services at competitive rates. Nowadays, this means HD video programming as part of a "triple play" package of video, high-speed Internet access and telephone. However, Zito's satellite competitors have a distinct advantage, as they are not subject to expensive separable security requirements.

Without the rule change proposed in the *FFNPRN*, Zito would have to incur the expense of HD CableCARD-supported boxes, which currently require an investment of about $300 each, in order to provide its customers with HD programming. Zito cannot absorb the cost of providing such boxes to its customers and so would have to pass the cost along by renting the boxes to its customers for about $10/month. As a result, Zito's rates for service would not be competitive with those of the satellite services, which are not held to CableCARD requirements.

Legal Considerations and Precedent – Since 1998 (under the directive of Congress in the Telecommunications Act of 1996) the Commission has imposed a ban upon the deployment by cable operators of navigation devices that perform both conditional access and other functions in a single integrated device, so as to afford consumers the option to purchase navigation devices from sources other than cable operators. In its most recent (2005) full-scale assessment of this "integration ban" prior to the FFNPRM – *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, 20 FCC Rcd 6794 (2005) – the Commission emphasized that its goal of achieving consumer choice by establishing a competitive market should not displace a low-cost set-top box option for MVPD subscribers. (*Id.*, ¶¶ 27 and 37.) Therefore, it resolved to entertain requests for waiver of the integration ban to permit limited-capability integrated digital cable boxes. (*Ibid.*) However, at that time it specifically excluded HD-capable boxes on the ground that HD was an advanced capability. (*Id.*, ¶ 37.)

In *Evolution Broadband, LLC*, 24 FCC Rcd 7890 (2009), the Commission granted an industry-wide waiver for the deployment of two specific low-cost "integrated" set-top boxes that combined conditional access and other limited functions so as to enable cable customers to view digital programming on analog television sets. At virtually the same time, in *Cable One, Inc*, 24 FCC Rcd 7882 (2009) (the "*Cable One Waiver*"), the Commission waived § 76.1204(a)(1) of its rules to authorize Cable One to deploy low-cost, limited-capability, one-way set-top boxes with integrated security **and HD capabilities** on a cable system serving approximately 7,000 subscribers. (*Id.*, ¶¶ 4 and 19.) Thus. the *Cable One Waiver* authorized the deployment of boxes that had HD functionality but otherwise met the standard of limited capability (which the Commission elaborated as excluding electronic programming guides, video on demand and other interactive features, *Id.*, ¶ 13).

In granting the *Cable One Waiver*, the Commission recognized that while HD may have seemed an advanced service in 2005, by 2009 it had become commonplace. (*Id.*, ¶ 12.) Consequently, the Commission concluded that "with the passage of time [since 2005], it is appropriate to add HD functionality to the list of one-way capabilities that can qualify for a waiver of the general rule." (*Ibid.*) Indeed, with the mandate to broadcast only in digital format having become effective last June 12, the demand for HD programming has only accelerated since grant of the *Cable One Waiver*.

The Commission further concluded that the device Cable One planned to deploy was unlikely to have a significant effect on the retail market for navigation devices (the purpose behind § 76.1204(a)), since (a) a retail market for the one-way devices in question had not developed, (b) manufacturers had discontinued production of limited function boxes and instead had focused their attention on advanced two-way boxes in which consumers have expressed increasing interest, and (c) devices with advanced functionality (including electronic programming guides, video on demand and other interactive features) would remain subject to the integration ban. (*Id.*, ¶¶ 12-14.) The Commission rejected concern over potential impact upon the development of a competitive market for full-function devices on the further ground that the consumer benefit of enabling cable subscribers to obtain the HD programming they expected and paid for when they purchased their sets outweighed any speculative threat to disrupt the national market for navigation devices. (*Id.*, ¶ 12.)

Even so, the Commission stated its intention to continue to observe the market to make certain that the waiver did not detrimentally affect the retail market for navigation devices. The Commission noted that the *Cable One Waiver* was the first of its kind and looked to Cable One to file annual reports that would enable it to assess the impact of the waiver on the retail market for navigation devices, so that the *Cable One Waiver* (and presumably others to follow) could be re-evaluated in light of the data to be obtained. (*Id.*, ¶ 15.)[1]

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[1] Unfortunately, that aspect of the Cable One Waiver remains unrealized. On November 20, 2009 Cable One filed a "Status Report and Request for Extension of Time" in which it noted that its commitment to deploy the HD boxes and to convert to an all-digital platform within one year had been premised upon the availability of such boxes at a wholesale cost of $50, which had not been attained. Consequently, Cable One requested an indefinite delay until that price point could be achieved. Unfortunately, there is no indication that that might be imminent, and Zito's own research and familiarity with manufacturers' products suggests that it is not likely to be achieved in the foreseeable future. As a result, it appears that the data that the Commission had anticipated receiving from the Cable One waiver experience will not be forthcoming. Thus the experience of Zito, as described herein, assumes greater significance in the present context as a basis for the proposed rule change.

Most recently, in the *FFNPRM*, the Commission noted that it has become deluged with further requests for waiver of the integration ban. (*FFNPRM* at ¶ 22.) Indeed, Zito had prepared such a request and was on the verge of filing it when the *FFNPRM* was issued. Clearly, it is more efficient to address the underlying policy directly and to proceed with the proposed rule revision than to evaluate innumerable similar requests individually and to impose substantial costs and delays upon the smallest cable operators, including Zito – the very entities that can least afford them and for which the need for relief is most acute in order to preserve meaningful competition in the delivery of HD video and broadband services.

There is one further legal consideration, prompted by the release on March 16 of the Commission's *National Broadband Plan*. Section 4.2 of the *Plan* specifically addresses the inequity of applying the rules implementing § 629 of the Communications Act (which mandates the separation of conditional access and navigation devices) only to cable operators, even though the statutory section refers to all MVPDs, including satellite TV operators. Thus, the *Plan* recognizes the precise competitive issue faced by Zito and which prompts the instant request for relief. It is further significant that, after reviewing the marketplace failure of CableCARDs (which were to have provided a solution to the need for cable operators to separate the conditional access element in a way that could be installed in any set-top box), the *Plan* proposes a simple, inexpensive gateway device to provide a standard interface between subscribers and networks; however, introduction of such devices is not to even **begin** until December 31, 2012. For the reasons stated herein, Zito requires immediate relief, without which the survival of its very small cable systems until the *Plan's* proposal even begins to take effect (assuming it does) is in severe doubt.

Practical Considerations – The video marketplace is rapidly migrating to HD, and Zito's customers increasingly demand HD service. HD programmers require encryption, and so Zito's subscribers will need an HD box with conditioned access to view HD programming on their HD sets. Standard Definition ("SD") boxes (of the type approved in the *Evolution Broadband* waiver, *supra*) cannot satisfy the growing need for reception of HD programming. (Ironically, the HD boxes Zito plans to use cost only $3 more than the SD boxes approved for industry-wide use in the *Evolution Broadband* waiver.) Zito knows its customers. Most are unwilling to pay monthly rental fees of $10 or so per box (especially where multiple sets are involved, each requiring a separate box) and Zito cannot afford to absorb the cost of providing them with fully-compliant $300 boxes. Therefore, in order to provide its customers with the HD service they demand and which Zito must provide in order to remain competitive with the satellite services, Zito needs the ability to deploy low-cost HD-capable boxes.

Rural companies such as Zito need to offer triple-play in order to survive. The features (including a strong video product) and pricing of triple-play must be comparable with its competitors' offerings. Specifically, Zito currently offers a video package consisting of 30-50 SD channels (no HD) for $25. In contrast, as evidenced by their currently advertised offers, Dish offers 120 SD channels for $24.99, and DirecTV offers 150 SD channels plus HD and a DVR for $29.99. Requiring Zito's customers to rent expensive full-function boxes will skew its costs relative to its competitors and destroy its ability to meaningfully compete. Indeed, DirecTV currently boasts on its website that it is "the TV package that beats cable" and that there is "no equipment to buy."

Zito recognizes that it ultimately will need to migrate to an all-digital platform, and it plans to do so in the future. In the meantime, though, Zito faces a further problem – many of its customers cling to their old analog sets and do not want a box at all. In fact, many of Zito's customers left the Dish Network for the very reason that they didn't want one of the Dish boxes. Zito needs to be able to offer these customers a choice between analog and digital cable. Fortunately, Zito is able to accommodate them, as it faces no compulsion to rapidly transition to all-digital cable systems, in contrast to Cable One when seeking the *Cable One Waiver*.

The boxes consistent with the Commission's proposal will be an integral part of an elegant MPEG-4 digital head-end solution by which Zito can utilize the existing capacity of its systems efficiently without the need for massive and prohibitively expensive rebuilds. Zito notes that it uses an MPEG-4 platform that affords it the capacity to continue to offer both analog and digital services, such that a full transition to digital will not be necessary in order to free up bandwidth to provide HD service and thereby fulfill the FCC's core policy objective of facilitating the transition to digital technology. Thus, there will be no need to cease analog service altogether in order to free up sufficient bandwidth to expand HD offerings. Rather, Zito's proposed MPEG-4 system will have sufficient capacity to continue to provide its traditional customers with analog service (but without the need for digital-to-analog converters) and at the same time provide digital customers with an appropriate complement of HD and other digital offerings – a variety of HD channels comparable to the package offered by its dish competitors, but at a relatively modest cost, enabling it to feed approximately 180 SD and 50 HD channels – *plus broadband Internet access* – all within a typical 240 MHz low-bandwidth capacity. [2]

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[2] Zito plans to offer TiVo's for customers desiring advanced services. As noted at p. 50 of the Broadband Plan, the Commission increasingly looks to set-top boxes as a gateway to consumer TV receivers for Internet content as well as traditional TV video, and as an interface for video and broadband applications from other devices, including mobile phones and personal computers, all of which eventually will encourage greater broadband utilization. While

Thus, Zito will provide its customers with three levels of service. Existing customers will be afforded the option to retain for the time being the analog equipment with which they have grown comfortable. The proposed devices will be offered only to existing customers who seek the benefits of HD programming but who are willing to forego the advanced features that many customers will want. New customers and existing subscribers with more sophisticated needs will obtain navigation devices that use a common separated security function, are fully compliant with the Commission's integration ban, and which Zito will fully support. This approach will enable Zito to realize crucial cost savings that will directly benefit consumers. By avoiding the need to pass along its increased costs of obtaining and deploying expensive full-function boxes, Zito will be able to provide appropriate boxes to its customers for a nominal monthly rental fee, while enabling box-averse customers to forego the need to install boxes altogether.

As did Cable One, Zito faces a situation that requires deployment of low-cost limited-capability HD boxes in order to survive. The other alternatives are the same ones that the Commission noted and rejected at ¶ 6 of the *Cable One Waiver*: require customers to pay $10 monthly rental per set for fully-compliant HD boxes, which most will not be willing to do; or provide SD-only boxes of the type approved in the *Evolution Broadband* waiver, which cost nearly as much, will rapidly become obsolete as customers upgrade their home receivers to HD, and will not appeal to customers already having HD sets. To these impractical alternatives can

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the limited-functionality boxes proposed herein are critical to Zito's ability to compete against satellite services in the immediate future, Zito will fully support the availability of advanced devices as customer needs evolve, be added one more: terminate Zito's analog cable service altogether and force the defection of Zito's customers who cling to their cherished analog sets and don't want any box at all.

Conclusion – Zito is faced with formidable challenges to its very ability to survive in face of competition by satellite-delivered services that do not face the same integration ban constraints and therefore can market their services at a significantly lower rate. The whole point of the integration ban was to create a robust competitive market for the delivery of video and other advanced services. Without the ability to meaningfully compete, Zito will have no choice but to exit its subject markets and thereby remove the consumer choice that it now provides.

The proposal in the *FFNPRM* to permit deployment of new one-way HD-capable navigation devices that perform conditional access and functions other than recording is vital to the ability of Zito and operators of other very small cable systems to survive and to provide meaningful competition in their markets, without in any way impeding the digital transition or impairing needed improvements to the CableCARD regime.

In view of the foregoing, Zito urges the Commission to adopt the proposal to permit deployment of low-cost, one-way, integrated, HD-capable all-digital navigation devices.

Respectfully submitted,

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